Supreme Court, U.S.
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No. 01-202

IN THE

Supreme Court of the United States

RICKEY B. BRYANT and BRENDA S. BRYANT, individually and as Guardians ad Litem for Chrystal R. and Stephanie Windham Bryant,

Petitioners,

v.

FOOD LION, INC. and FOOD LION, INC. GROUP BENEFIT PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FOOD LION, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Food Lion, Inc., whose corporate name was changed on September 8, 1999 to Delhaize America, Inc., states that all of its issued and outstanding stock is owned by Etablissements Delhaize Freres et Cie "Le Lion" S.A., a societe anonyme organized under the laws of the Kingdom of Belgium ("Delhaize Group"). Delhaize Group's American Depositary Shares, which are evidenced by American Depositary Receipts, are publicly traded on the New York Stock Exchange, and its Ordinary Shares are publicly traded on Euronext Brussels.

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5 C.F.R. § 890.1102 (2001) 6

Respondent Food Lion respectfully requests that the Court deny petitioners' request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits the district court's critical findings of fact on the issue of gross misconduct under COBRA. The evidence convinced the trier of fact that the grounds for Rickey Bryant's discharge were far more serious than Petitioners' presentation suggests. The district court found Bryant guilty of gross misconduct because of his flagrant insubordination on matters of utmost importance that endangered his employer's business. The Fourth Circuit reviewed those findings for clear error and found none. Accordingly, the key factual portions of the trial court's order and supporting evidence are outlined below.

It is undisputed that Bryant was a capable assistant store manager. He had nine years of experience and was very familiar with his assistant manager duties and responsibilities. Despite his ability to do his job well, Bryant's performance was always inconsistent; numerous problems had been documented over the years. Tr. 459, 504-509, 513, 999, 1036-1037, Helms Dep. 211. Nevertheless, mere poor performance never got Bryant fired.

Petitioners quote (Pet. 5) the district court's finding in Paragraph 36, on Bryant's ERISA Section 510 claim,[1] that

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1. Section 510 of ERISA, 29 U.S.C.A. § 1140 (1999), is a statute prohibiting discrimination. Under Section 510, the district court had to determine whether Food Lion fired Bryant with specific intent to deprive him of his profit sharing plan benefits. App. 47a-48a, 55a-56a.

"Bryant's discharge was 'based on poor performance'." They omit, however, the district court's footnote at the end of that phrase and fail to disclose its omission. After the phrase "Bryant's discharge was based on poor performance," the district court's opinion contains a footnote which reads, "Indeed I find that Bryant's conduct rose to the level of 'gross misconduct.' *See, infra*, re: COBRA claims . . . ." App. 28a, n.60. The district court subsequently found that Bryant was terminated for repeated, intentional misconduct that presented a danger to Food Lion. App. 39a-40a, 60a-61a.

At trial, Bryant's accounts of his discharge were contradicted by his superiors and by a co-worker. Tr. 1170-1171, 1179-1180, 1183-1188. The supervisors, Waddell, Sweeney, and store manager Fudge, were all former employees who had no relationship with Food Lion at the time of trial. Tr. 992-993, 1084-1085, 1168. The district court accepted their version of the facts rather than Bryant's version. App. 39a.

Bryant admitted that store conditions were his responsibility. Tr. 462-463. In December 1987 and March 1988, Bryant's supervisors repeatedly brought to his attention serious problems that adversely affected critical aspects of Food Lion's business. Twice in December and four times in March, the product level was unacceptably low. Def. Ex. 66, 67, 68, 69, 70. Tr. 1040, 1060, 1102, 1184. Twice in December Bryant had failed to cure hazardous conditions by ensuring that merchandise was safely stacked on the shelves. Tr. 461, 1002-1003. Most importantly, store cleanliness was a reoccurring problem.

As assistant store manager, Bryant was responsible for store cleanliness. Tr. 466, 1088-1089. Bryant's supervisors visited his store three times in December 1987 and found the store dirty each time. On the third occasion, Bryant was suspended and

warned that further violation would result in discharge. Def. Ex. 71. Tr. 1086-1090. Thereafter, despite numerous warnings and orders and sufficient time to comply, Bryant still refused to keep the store clean. In March 1988, Bryant's area supervisor, Tom Sweeney, made four visits to his store. Each time, Sweeney found serious cleanliness problems. On three of the four visits, Sweeney found multiple areas of the store dirty. Def. Ex. 66, 67, 68, 69. As a result of Bryant's repeated refusal to obey orders, Sweeney discharged Bryant on March 22, 1988. Def. Ex. 72, 73. Tr. 1085-1111, 1137, 1180. Several of Sweeney's orders and warnings had related to the critical matter of store cleanliness. Tr. 1088-1095, 1099-1103. Bryant's store manager, David Fudge, had also expressly given Bryant the same orders. Tr. 1171.

Sweeney contemporaneously documented in a disciplinary memo the reasons for Bryant's discharge. That memo identifies rule number 3 as one of several rules Bryant violated. Def. Ex. 72. Rule number 3 prohibits "absolute refusal to comply with the instructions of any Supervisor." Def. Ex. 114.[2]

The district court rejected Bryant's version of the circumstances giving rise to his discharge. Instead the district court found as a fact that "[t]he reasons for his discharge are explained in the testimony of Tom Sweeney, Dallas Waddell, David Fudge and Jimmy Hanna." App. 39a. These witnesses' testimony comprises 189 transcript pages and references numerous exhibits. From those witnesses' testimony, the district court found:

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2. Food Lion's insurance director testified that Rule number 3 includes insubordination. Tr. 901-903. The insurance supervisor testified that failure to obey a direct order would violate rule number 3. Tr. 1538.

> The evidence demonstrates that Bryant had been employed by Food Lion for 9 years and was well aware of the duties and expectations of his job. The evidence further demonstrates that he *repeatedly refused to obey direct orders and instructions from his store manager and his area grocery supervisor. Several of the assigned tasks related to cleanliness*, which is of obvious importance to Food Lion. He had plenty of time, opportunity and assistance from others available to him to accomplish the tasks he was ordered to do. The conclusion from the *evidence is inescapable that his failures to comply with Fudge's and Sweeney's instructions were willful and intentional insubordination* and constituted absolute refusal to comply with his supervisors' instructions. I find, therefore, that Bryant's conduct falls within the meaning of Food Lion's Rule No. 3 and that he was terminated for gross misconduct.

App. 39a-40a (emphasis added).

The district court adopted a definition of gross misconduct previously applied in another South Carolina case, *Karby v. Standard Products Co.*, 1992 WL 333931 (D.S.C. June 22, 1992) (unreported). That definition of gross misconduct requires such a "substantial deviation from the high standards and obligations of a managerial employee that would indicate that said employee cannot be entrusted with his management duties *without danger to the employer*." App. 60a (emphasis added). The district court concluded, based upon the evidence it found persuasive, that Bryant's conduct fit this narrow definition:

> In light of prior warnings about the very conduct for which he was discharged, Bryant's *flagrant, repeated insubordination* and his position as assistant store manager, the grounds for his termination fit the *Karby v. Standard Prods.* definition. *The tasks that he was asked to perform are ones he knew were important* to Food Lion. *They related to cleanliness of the store* and product level, both of which are significant to the company and to its customers. This court is satisfied that this insubordinate conduct of Bryant falls within the definition of gross misconduct articulated in *Karby v. Standard Prods.* and constitutes gross misconduct within the meaning of 29 U.S.C. § 1163(2).

App. 60a-61a (emphasis added). The Fourth Circuit affirmed this conclusion "[i]n light of the district court's findings of fact as to the nature of the conduct involved." App. 3a-4a.

REASONS FOR DENYING THE WRIT

The petition should be denied because no conflict whatsoever exists between the opinions of the Fourth and Seventh Circuits, and the petition presents no significant question warranting the Court's attention.

I. The Fourth Circuit's Ruling Does Not Conflict With the Seventh Circuit's Ruling in *Mlsna*

Petitioners' contention that the Fourth Circuit and the Seventh Circuit reached opposite results about the meaning of gross misconduct is disingenuous. In fact, the two courts did not even address the same issue. Petitioners have manufactured the asserted conflict between the Fourth Circuit's ruling in this case

and the Seventh Circuit's ruling in *Mlsna v. Unitel Communications, Inc.*, 91 F.3d 876 (CA7 1996), by misconstruing those rulings. Petitioners in effect seek an advisory opinion because the decisions below do not raise the Question Presented in the Petition.

Petitioners' assertion that the Fourth Circuit adopted a legally erroneous definition of gross misconduct is entirely predicated upon their version of the facts, which the district court did not believe. The district court found that Bryant was fired for *intentional* acts that *endangered his employer*. App. 40a, 60a-61a. Such intentional misconduct is very rare and unusual for an admittedly capable, knowledgeable and experienced employee. It is intolerable for a member of management who is setting an example for dozens of employees under his supervision. When read in light of the true seriousness of Bryant's acts, the Fourth Circuit's interpretation of gross misconduct comports with the facial language of the statute, with the existing reported decisions, including *Mlsna*, and with the regulation issued by the Office of Personnel Management which interprets "gross misconduct" as used in 5 U.S.C.A. § 8905a(b) (1996).[3]

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3. Petitioners reference that regulation (Pet. 11) even though the regulation does not apply to private employers. That regulation defines gross misconduct for federal employees as "a flagrant and extreme transgression of law *or* established rule of action for which an employee is separated." 5 C.F.R. § 890.1102 (2001) (emphasis added). The district court found that Bryant was fired for flagrant violations of Food Lion's established rules of conduct. App. 36a, 39a-40a, 60a-61a.

A. Petitioners misconstrue the Fourth Circuit's ruling

The posited conflict between the circuits is premised on petitioners' version of the facts in this case. Those facts were hotly contested at trial, and the district court rejected petitioners' version. The district court believed Food Lion's witnesses and not petitioners' witnesses. Petitioners ignore the district court's express factual findings and present here the same whitewashed version of Bryant's discharge that failed to persuade the courts below.

Contrary to the statement in petitioners' Question Presented (Pet. i) the Fourth Circuit did not conclude that mere failure to complete assigned tasks constituted gross misconduct. Petitioner's statement (Pet. 8) that the Fourth Circuit found gross misconduct "solely on findings of 'inconsistent' or 'poor' performance" could not be further from the truth. While inconsistent performance had characterized Bryant's nine-year career at Food Lion, (App. 28a, ¶33), far more serious problems precipitated Bryant's discharge than mere poor performance (App. 28a, n.60).

Petitioners' prior attempts to trivialize Bryant's misconduct were rejected by the district court and the Fourth Circuit. Petitioners stress here, as they did to the lower courts, Sweeney's vague statement that he fired Bryant for "not doing his job." Obviously, however, "doing his job" included obeying direct orders of his superiors. The district court found that Bryant was "clearly" insubordinate. App. 38a.[4] The district court found that

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4. Petitioners assert here the same baseless proposition they unsuccessfully argued to the courts below, *i.e.*, that Bryant was not insubordinate because he was not openly defiant. In their effort to

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he was fired for *repeatedly refusing* to obey direct orders of his area supervisor and of his store manager on matters he knew were important to Food Lion. Several orders related to cleanliness which is critically important in a grocery store. App. 39a. The record is replete with evidence to support these findings. The district court found it "inescapable" that Bryant was guilty of "willful and intentional insubordination." App. 40a. The Fourth Circuit found no clear error in those findings.

The Fourth Circuit concluded that Bryant's flagrant, repeated insubordination as a manager constituted gross misconduct. App. 3a-4a. The Fourth Circuit did not address whether any less serious employee behavior would constitute gross misconduct. It certainly did not hold that gross misconduct includes mere failure to perform job duties or poor performance because the record below and the district court's findings presented no such issue.

(Cont'd)

downplay the seriousness of Bryant's misconduct, petitioners quote one paragraph of Sweeney's 68 page testimony in which Sweeney was asked if Bryant "absolutely" refused to obey orders. By the time of trial, Sweeney had been gone from Food Lion for eight years and he did not recall what Food Lion's definition of "absolute refusal" was. Tr. 915, 1084-1085. His response to that question merely indicates that Bryant was not openly defiant or rebellious. However, it is abundantly clear from the totality of Sweeney's and Fudge's testimony that Bryant was deliberately disobedient and was fired for that reason. Whether he was openly defiant or rebellious is irrelevant because insubordination does not require verbal dissent.

B. The Seventh Circuit addressed a different issue than did the Fourth Circuit

Petitioners misconstrue *Mlsna* to say that gross misconduct requires proof of bad faith malfeasance. The Seventh Circuit did not limit the meaning of gross misconduct to bad faith malfeasance. Indeed, the Seventh Circuit's suggestion of bad faith malfeasance as an *example* of the kind of conduct that may constitute gross misconduct was *dictum* because the district court had not found any such bad acts to have occurred. Petitioners seize upon the Seventh Circuit's *dictum* and use their misinterpretation of it to argue that the Fourth Circuit adopted a different legal standard for gross misconduct. In fact, neither circuit has articulated a generally applicable definition of gross misconduct, and the Fourth Circuit's ruling presents no conflict with the Seventh Circuit's *Mlsna* decision.

Mlsna involved materially different facts from this case. The employee in *Mlsna* was incompetent; Bryant was admittedly capable. The employee in *Mlsna* was negligent; Bryant was intentionally disobedient. The problems of the employee in *Mlsna* were largely unnoticed until after he separated; Bryant's flagrant insubordination on the important matter of store cleanliness endangered Food Lion's business and resulted in his discharge. In each case, the district court's decision was based upon a fact-intensive analysis of disputed evidence and on credibility determinations that are due special deference. Each court of appeals found no clear error in the district court's findings and affirmed on the basis of the respective evidentiary records and factual findings.

The district court in *Mlsna* held that the plaintiff was fired for job incompetence and that incompetence alone did not constitute gross misconduct. The Seventh Circuit affirmed that

conclusion. 91 F.3d at 881. The employer in *Mlsna* had argued that the plaintiff was also guilty of more serious delicts such as starting a competing business while still employed. However, the district court did not believe the plaintiff was guilty of any such improprieties and the Seventh Circuit also affirmed that conclusion. 91 F.3d at 882. Furthermore, the employer in *Mlsna* admitted it did not learn of the alleged disloyal, anti-competitive acts until after the date that the employee's employment terminated. 91 F.3d at 880. Consequently, the Seventh Circuit's assumption that certain acts (e.g., starting a competing business during employment) would be "bad faith malfeasance" and therefore gross misconduct was *dictum*.

The only issue decided in *Mlsna* was that incompetence is not gross misconduct. That issue was not presented to the Fourth Circuit. The Seventh Circuit did not address whether intentional misconduct by a competent management employee would constitute gross misconduct. The Fourth Circuit addressed only the question of such intentional misconduct. In this case, the district court found that Bryant was intentionally disobedient of direct orders on matters of such importance as to *endanger his employer* and the Fourth Circuit affirmed the finding that such actions by a manager constituted gross misconduct. Thus, these two circuit court decisions present no conflicting legal interpretations, but simply concurrent findings of fact that are presumptively correct.

II. This Case Presents No Issue Warranting the Court's Attention

Petitioners' suggestion that this case presents an issue having widespread impact is belied by the paucity of cases addressing the meaning of gross misconduct under COBRA. Nationwide, reported cases have averaged approximately one per year since

COBRA's enactment in 1985. This case and *Mlsna* are the only cases on the issue that have been presented to the courts of appeal in the intervening sixteen years.

The Fourth Circuit's ruling in this case is so fact specific that review by this Court is unlikely to produce any useful guidance for lower courts. The Fourth Circuit did not adopt any generally applicable definition of gross misconduct. It established no standard to be used in future cases. It simply affirmed the finding of gross misconduct on the basis of the facts as found by the district court. Those facts included Bryant's significant position, his knowledge of the importance of the tasks he was ordered to accomplish, and his intentional acts that endangered Food Lion's business. The Fourth Circuit's opinion on these unique facts is unlikely to have any application to other cases.

Furthermore, no confusion or inconsistency exists in or among the district court decisions on this issue. Few courts have directly addressed the issue of what kind of action would constitute gross misconduct, but existing decisions present a common theme. Those courts have distinguished between incompetence or negligence or poor judgment on the one hand, and some deliberate, willful or reckless disregard of the employer's business interests.[5] The definition adopted by the

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5. *See, e.g., Lloynd v. Hanover Foods Corp.*, 72 F. Supp. 2d 469 (D. Del. 1999) (unintentional error that was ordinary, not gross negligence, did not constitute gross misconduct); *Collins v. Aggreko, Inc.*, 884 F. Supp. 450 (D. Utah 1995) (driving company car while drunk and causing serious accident was wanton and deliberate disregard of employer's interest and therefore gross misconduct.); *Burke v. American Stores Employee Benefit Plan*, 818 F. Supp. 1131 (N.D. Ill. 1993) (use of stolen stamps to obtain free merchandise was theft and constituted gross misconduct); *Conery v. Bath Assocs.*,

(Cont'd)

district court in this case recognizes this significant distinction and imposes the rigorous requirement that the employee's action *endanger* the employer.

Contrary to petitioners' suggestion (Pet. 10), no case has interpreted "gross misconduct" in 29 U.S.C.A. § 1163(2) (1999) to require criminal conduct. No basis exists for applying a criminal standard, either. If Congress had intended "gross misconduct" to mean criminal acts, it could have easily said so, instead of using broader language.[6]

Petitioners contend (Pet. 13), that a writ of certiorari should be granted to clarify that "gross misconduct" as used in 29 U.S.C.A. § 1163(2) includes only extreme instances of deliberate malfeasance. The district court's findings of fact and the evidence supporting them demonstrate that no clarification is needed. The acts that precipitated Bryant's discharge were extreme acts of malfeasance. They endangered Food Lion's

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803 F. Supp. 1388 (N.D. Ind. 1992) (misappropriation of company funds, if proved, would be gross misconduct); *Paris v. F. Korbel & Bros., Inc.*, 751 F. Supp. 834 (N.D. Cal. 1990) (waitress' exercise of "poor judgment" in breach of confidentiality rule was not gross misconduct). *Cf.*, *Zickafoose v. UB Servs. Inc.*, 23 F. Supp. 2d 652, 657 (S.D.W. Va. 1998) ("gross misconduct for purposes of COBRA includes non-work related outrageous behavior [committed by manager in his own home] if there is a substantial nexus between the behavior and the working environment such that the effects of the intolerable behavior extend into the employment arena").

6. Two courts have expressly rejected arguments that gross misconduct requires intent. Each relied on the express statutory language, which imposes no such requirement. *See*, *Zickafoose*, 23 F. Supp. 2d at 656; *Collins*, 884 F. Supp. at 454.

business. They constitute gross misconduct under any reasonable construction of the statutory language. Accordingly, review of the Fourth Circuit's decision will not change the result in this case.

CONCLUSION

For the foregoing reasons, Respondent, Food Lion, Inc., respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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